

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 40396  
Docket No. MW-40639  
10-3-NRAB-00003-080442**

**The Third Division consisted of the regular members and in addition Referee Sherwood Malamud when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
PARTIES TO DISPUTE: (  
(Union Pacific Railroad Company (former Southern  
( Pacific Transportation Company [Western Lines])**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier failed to call and assign Bridge and Building Sub-department employees A. Da Costa, S. Mc Colgan and H. Paredes to overtime service at Keene, California, on January 13 and 14, 2007 and instead called and assigned junior Bridge and Building Sub-department employees C. Wilson and J. Chavez (Carrier’s File 1473571 SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants A. Da Costa, S. Mc Colgan and H. Paredes shall now ‘. . . each be compensated for any overtime that Mr. Chavez and Mr. Wilson worked on January 13<sup>th</sup> and 14<sup>th</sup>, 2007. The compensation shall be at the time and one half (overtime) rate at the Claimant’s respective (sic) rate of pay, because of the Agreement violations cited herein.”’**

**FINDINGS:**

**The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:**

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Carrier maintains the Keene Water system that provides water service to 35 private residences in Keene, California. On or about January 13, 2007, the water lines froze leaving these residences without water service. The Carrier met this emergency by calling out C. Wilson, a Welder on furlough from the Water sub-department to the B & B sub-department on Gang 8043. Wilson holds Water service seniority and is familiar with the Keene Water system. These facts are undisputed in the record.

Manager Lamb submitted the following statement on the property setting forth the Carrier's version of the facts, as follows:

"UPRR is responsible to maintain the Keene Water System with 35 homes on the lines. On the days listed we had a freeze that broke the water lines and wells to supply water to the system. B. Gafford called me to ask for help to get the system running. I told him to call Mr. C. Wilson who has a water service date and experience on working with the system. I told him to call out any more help he needed from the B & B starting with senior man. He called the foreman S. McColgon, no answer, called H. Paredez, no answer, and called A. Dacosta, no answer, and finally he called J. Chavez who answered. They worked until the system was up and running and people had water to their homes."

The Organization submitted the statements of Paredez and Dacosta, which indicated that they were willing and available to work this overtime. Although they were available by phone, they received no call from the Carrier. In his statement presented on the property, Dacosta charged, "Mr. Bill Gafford did not call me or any of the Claimants out. Mr. Gafford even admitted this to us when he saw us on Monday."

In addition, the Organization submitted a statement from J. Chavez, the employee who performed the work on January 13 and 14, who not only corroborated the statements of Claimants Dacosta and Peredez, but added the following:

**“Manager Lamb states that the above claimants were offered the overtime work, and were not available when calls were made. This simply is not the case, in fact this has been an ongoing issue for several months, and has been addressed to both Bill Gafford and Rich Lamb on several occasions by the above named claimants and myself. Corbit Wilson currently holds a position as a welder on Gang 8043/B & B, as well as a date established in the water service. This is where the problem lies. Bill Gafford has failed to call out the claimants due to the fact that he feels Corbit Wilson has a seniority date in the water service.”**

**Claimant Foreman S. McColgon on Gang 8043 did not file a statement.**

**The Carrier objects that only two employees performed the overtime work at issue, yet there are three Claimants. The Board concurs that the claims of only the two most senior Claimants should be considered.**

**The Carrier called C. Wilson, the second least senior member of Gang 8043. The Board determines that it was appropriate to do so. This was an emergency situation, particularly for the occupants of the 35 residences without water. The Carrier is obligated to provide water service to these residences. Wilson holds seniority in the Water Service Sub-department. He is familiar with the Keene Water System. The Board is not confronted with a competing claim from any other Water Service employee. In an emergency, one that concerns the Water Service, it is an appropriate exercise of its discretion for the Carrier to call a Water Service employee on furlough to the B & B Sub-department to perform water service work. The Organization points to no Rule that would establish otherwise.**

**Because the Carrier appropriately acted within its discretion to assign the overtime to C. Wilson to address a water emergency, the question remains whether the Carrier complied with the Rule when it called Chavez to assist Wilson effectuate the emergency repairs to the water lines. In his statement, Lamb indicates that he**

told Gafford to call Gang 8043 members, in seniority order, to obtain assistance for Wilson to perform this overtime work.

Lamb indicates in his statement that the Claimants were called in seniority order by Gafford. When he received no answer, Gafford continued to call. Chavez received and accepted the call and performed the overtime work. If this version of the facts is accepted, then the Carrier fully accommodated the Claimants' seniority rights recognized under Rule 25(b) when it had Chavez assist by working the overtime on January 13 and 14.

The Organization points to the Claimants' statements that they were available, but received no call. At this juncture, the record established on the property contains conflicting statements of fact that the Board has no way of resolving. If this represented the complete record, the Board would find that the Organization failed to meet its burden of proof. See Third Division Awards 33487 and 33895.

That is not the state of the record, in this matter. Dacosta asserts that Gafford admitted on the following Monday, January 15 that he did not call the Claimants. The Board accepts as fact that it was Gafford who made the calls. He did not submit any statement on the property. There is nothing in the record that contradicts or amounts to a denial that Gafford made this admission that he did not call the Claimants.

On the one hand, the record made on the property does not establish why Gafford would begin calling Gang 8043 members beginning with Chavez rather than with Foreman McColgon. On the other hand, the Board must accept Dacosta's undisputed assertion that Gafford admitted that he did not call the Claimants. As an appellate body, the Board has no way of looking behind the statements submitted by the parties on the property.

The Board is left with a record in which it is an established fact that Gafford was supposed to call the Claimants, but he made an admission against his interest that he did not follow his Manager's instructions. He did not call the Claimants. Accordingly, the Board concludes that the Carrier violated Rule 25(b) when it failed to call and offer the overtime to the most senior Claimant. The Organization established that the Claimants were available, willing, and able to work the overtime if it had been offered.

The Carrier shall pay the most senior Claimant 16 hours at the overtime rate consistent with the number of hours worked and paid to Chavez who worked those hours on January 13 and 14, 2007.

The Organization failed to meet its burden of proof with regard to the assignment of C. Wilson to work the overtime on January 13 and 14, 2007. It failed to establish that the Carrier violated any Rule when it assigned the overtime to Wilson.

**AWARD**

Claim sustained in accordance with the Findings.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of March 2010.